81-2229

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No.

In the Supreme Court of the United States

May Term, 1982

MARIO B. CHIAFARI

Petitioner

v.

U.S. Department of the Interior Ex Al

Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Fourth Circuit

MARIO B. CHIAFARI
7912 Redstone Road
Kingsville, MD 21087
(301) 592-6785

I

QUESTIONS PRESENTED

1. Whether the Appeals Court erred in its opinion to affirm the Merit Systems Board decision.

2. Whether the removal sanction was instituted to surpress an employee's right to question verbal orders which conflict with contract documents that may prove detrimental to the interests of the United States.

II

LIST OF ALL PARTIES

Parties Petitioner:

Mario B. Chiafari

Parties Respondent:

U.S. Department of the Interior, Ex Al

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No.

In the Supreme Court of the United States

May Term, 1982

MARIO B. CHIAFARI

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

The Petitioner, Mario B. Chiafari respectfully asks that a Writ of Certiorari be issued to review the final opinion of the United States Court of Appeals for the Fourth Circuit entered February 4, 1982.

OPINIONS BELOW

The decision of the Merit Systems Protection Board was affirmed.

JURISDICTION

The opinion of the Court of Appeals for the fourth Circuit was entered on February 4, 1982 by no. 81-1553.

STATEMENT OF CASE

The following facts are part of the record:

I, Mario B. Chiafari being a graduate Civil Engineer for twenty-four years, obtaining above average Performance Evaluations with commendations in fourteen of my sixteen years with the Federal Government until my 12-6-77 position with the National Park Service.

While assigned to the Harpers Ferry Waste Water Treatment Facilities (12-7-77) change order documents (for changes completed before my assignment) were submitted for my approval; after the fact, contrary to contract documents and government procedures. I was verbally instructed by Mr. Powell of N.P.S. to process the documents, providing me with an unexecuted letter of authority. I refused to approve change orders and notified my supervisors in Fall Church of the non-compliances. After obtaining contradictory verbal instructions, I requested direction per certified mail. I was subsequently removed from the project. Original change orders are available.

I resisted changes to the drawings and specifications for the John F. Kennedy "Repair of Leaks" project without proper documentation procedure, as established by the contract documents. I attempted to encourage the review of proposal changes by the Design Architect, an established procedure. I was ordered back to Falls Church Office.

On the "Fort Hunt" Project, my efforts included having the contractor adhere to his contract obligations, including his submission of "Testing and Certification" by a registered Profession Engineer from an independent testing agency of the Solar System; a contract requirement. The Engineer and testing agency had to certify the Solar System functioned satisfactory and the "Test Data" complied with the Project Specifications and Drawings. I verbally related my concern to Mr. Dinterman, when it appeared changes were being incorporated without proper documentation. Once again I was confined to the Falls Church Office.

On the "Rock Creek Park Project", due to persis-

tant unacceptable contractor submissions not complying with the project specifications, and government procedures, I, requested certification for all submissions. In accordance with the contract documents, the contractor was responsible to use an identification and approval stamps certifying compliance with project drawings and specifications or noting all deviations therefrom. I verbally informed my supervisor and, by certified mail documented my findings.

During the above stated instances, my supervisor, although verbally informed of my findings, refused to initiate written correspondence to the contractor; occasionally after my certified mail documentation. My supervisor possessed the authority to direct written communication to the contractors, documenting transgressions from the contract documents.

Mr. Dinterman refused to acknowledge my 3-24-80 memo outlining the objections to the contractors submissions. I confronted Mr. Galvin, higher authority in Denver with my findings, requesting cor-

rective action on his part. My removal from the service followed these actions, on trumped-up charges or inefficiency and insubordination.

I believe Mr. Dinterman became convinced of my steadfast attitude not to vary from the contract documents, except as prescribed within. He decided to withhold my rightfull Performance Evaluations of three and twelve months after my appointment date, to harass me into capitulation or resignation. When confronted with my 3-24-80 memorandum and my unvarying resolution to adhere to contract requirements, I was charged with inefficiency and insubordination. The charges of inefficiency were not sustained by the Merit Systems Protection Board.

REASONS FOR GRANTING WRIT

The record contains the following facts which denies the charges of insubordination. In the order sustained within the Merit Systems Protection Board Decision No. DC07528010149.

1. As to my failure to visit Rocks Creek Park:

Faulty government vehicles and Mr. Huber's written refusal to utilize my private vehicle prevented my visit on 3-26-80.

Mr. Huber recinded his decision verbally to comply with Mr. Dinterman's instructions in late afternoon. "I visited the site with my personal auto on 3-27-80. Copies of Kenneth Reieff 6-22-78 and Elwood R. Rench 6-8-78 letters attest to faulty G.S.A. furnish vehicles.

2. I brought to Mr. Wilson's (the contractor) attention pertinent sections of the specifications which governed the submissions as noted in my certified mail 3-24-80; after verbally noting said sections repeatedly.

3. I utilized Frank envelopes for Government

business only; not for personal business. Contradictory verbal statements from my supervisor made the use of certified mail mandatory to record events after discussing my findings of non-non compliant items.

4. My letter of 5-12-79 conferred Doctor Oteyza's verbal statement concerning disposition of Form C-16. "According to my physicians, Dr. Ben Oteyza, executed forms of CA-16 were posted in a self-addressed envelope provided by the Falls Church Office." Dr. Oteyza certified the same information within item 21 of form CA-20, explaining the disposition of the then remaining delinquent form; attesting originals were in the possession of the Falls Church Office. To date I have not been reimbursed for job-related injury medical expenses.

5. The standard 10-135 Form, part IA and IB requires the supervisor to elaborate on checked yes and no answers. In IB3 the supervisor was to explain all such answers. Mr. Dinterman refused to elaborate a definitive answer. He refused to furnish copies of the completed evaluation or portion thereof on the day of

execution. Although I requested, no attempt was made to record the minutes of our numerous personnel meetings to establish the issues. I realize his determination to deny my rightful Performance Evaluation.

6. My written requests for assistance enclosing copies of my interoffice memo's to Denver Personnel Office remained unanswered. Issues included within these requests were addressed neither by Miss Witner or Miss Reynolds of the Denver Personnel Office. They avoided my requests for written documentation (See memo 6-24-79). Although informed of Personnel procedures irregularities utilized by the Falls Church Office, no positive action was taken by Denver. I could not accept additional meetings until these Personnel irregularities were either acknowledged or disclaimed in writing by Denver.

CONCLUSION

I concur with Admiral Richover's statement, "A certain measure of courage in the private citizen is necessary to the good conduct of the State, otherwise men who have power through riches, intrique or office will administer the State at will and ultimately for their private advantage." In conjunction with my moralistic beliefs, I declined to administrate management procedures contrary to any contract requirements which may prove detrimental to the interests of the United States."

The Merit System Protection Board absolved me of all charges of inefficiency. The trumped-up insubordinate charges and claimed service inefficiency was related to action on my part in obtaining my rightful overdue Performance Evaluations or my attempt to protect Government interests. The sustained charges were devised to remove my person, an obstacle in perpetuating the administration of the State at will for possible private advantage.

APPENDIX

Findings of Fact of the Merit Systems Protection Board

The Department of Interior, National Park Service after notice dated April 17, 1980, removed Petitioner from employment on May 16, 1980 on grounds of inefficiency and insubordination. Upon appeal to the Merit Systems Protection Board, the hearing examiner found charges of inefficiency not to be sustained, but concluded the charges of insubordination were sustained. He found the sustained charges sufficient to justify removal. The full Board affirmed on May 13, 1981 following for which a Petition for Review was timely submitted, failed in the court.

Note: Additional evidence was submitted in opposition to the Presiding Officials sustained charges, dated November 11, 1980.

Contents: Four pages of arguments and thirty-two copies of supporting (mostly new) documents.

A2

JUDGEMENT OF

THE UNITED STATES APPEALS COURT

(Filed February 4, 1981)

No. 81-1553

UNITED STATES COURT OF APPEALS

FOR THE FOURTH DISTRICT

MARIO CHIAFARI

Petitioner,

v

DEPARTMENT OF INTERIOR AND

MERIT SYSTEMS PROTECTION BOARD

Respondents.

RUSSEL, HALL and MURNAGHAM,

Circuit Judges.

In accordance with the accompany findings of the Merit Systems Protection Board conclusions of Law and Order.

Mario B. Chiafari was fired from his position with the National Park Service for inefficiency and insubordination. After the dismissal was upheld by the Merit Systems Protection Board, Chiafari appealed to this

Court pursuant to 5 O.S.C. S 7703.

Our review of the record convinces us that Chiafari's will-documented intransigence had a significant impact on Service's efficiency, and that these factors justify his dismissal.

Accordingly, the decision of the Merit Systems Protection Board is affirmed.

CERTIFICATE OF SERVICE

I, hereby certify that I caused the foregoing (3 copies) Petitioner's Brief to be mailed by Certified Mail — Return Receipt Requested to Ross W. Dembling, Esquire, Council for Respondent, Office of the Solicitor U.S. Department of Interior, 1849 C Street N.W. Washington, D.C. 20240.

Mario B. Chiafari

MARIO B. CHIAFARI

STATE OF MARYLAND
COUNTY OF HARFORD

I hereby certify that on this 30th day of April, before me, a Notary Public in the State of Maryland, County of Harford, Mr. Mario B. Chiafari acknowledged the above to be his free act and deed.

Eleanor L. St. Clair

(Eleanor L. St. Clair)
Eleanor L. St. Clair, Notary Public
My Commission Expires July, 1, 1982

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~~May~~ OCTOBER Term, 1981

MARIO B. CHIAFARI

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U.S. Department of the Interior ~~Et~~ Al

Respondent

APPENDIX TO PETITION

MARIO B. CHIAFARI
7912 Redstone Road
Kingsville, MD 21087
(301) 592-6785

A1

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MARIO B. CHIAFARI

v.

DEPARTMENT OF THE INTERIOR

OPINION AND ORDER

Appellant, Mario B. Chiafari, was a Civil Engineer with the National Park Service. He was removed, effective June 19, 1980, based on charges of inefficiency and continued inadequate work performance, insubordination and failure to follow instructions of his superiors. He filed a timely appeal of this decision with the Board's Washington, D.C. Field Office. A hearing was held at appellant's request. The presiding official sustained the removal in his initial decision dated October 10, 1980, finding that the agency had proved the majority of its charges by a preponderance of the evidence and appellant's removal was for such cause as would promote the efficiency of the service.

Appellant filed a timely petition for review in which he alleged that the presiding official erroneously interpreted the evidence presented. Attached to the petition were numerous documents. Some of these documents were already in the record and some were presented to the Board for the first time as attachments to the petition for review. All of the documents, however, were in existence prior to the closing of the record by the presiding official.

The Board has previously held that the failure of a party to present evidence prior to the close of the record will preclude it from doing so by way of a petition for review under 5 C.F.R. 1201.115(a) unless there is a showing that, even with due diligence, the evidence was unavailable prior to the closing of the record. **Szczerbiak v. United States Postal Service**, MSPB Order No. CHO75299071 (August 19, 1980); **Beer v. Department of the Army**, 2 MSPB 226 (1980). Appellant has not attempted to show why this evidence could not have been introduced prior to the close of the record. The "new" documentary evidence

submitted by appellant as attachments to his petition for review, therefore, does not constitute new and material evidence which, despite due diligence, was not available prior to the close of the record.

Additionally, appellant did not assert, in his petition for review, that the presiding official improperly applied the requisite standard of proof to the agency's evidence presented in support of its action. Rather, appellant's entire petition for review constitutes nothing more than disagreement with the findings of fact, interpretation of the evidence and credibility determinations of the presiding official. Such interpretations and findings by a presiding official are entitled to deference by the Board since the presiding official has observed the demeanor and has heard the testimony of the witnesses. **Weaver v. Department of the Army**, 2 MSPB 297 (1980). The Board finds no basis that would warrant reversal of the presiding official's determinations.

The Board, having fully considered appellant's petition for review of the initial decision and finding

that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

May 13, 1981
Date
Washington, D. C.

Robert E. Taylor
Secretary

Note: Additional evidence was submitted in opposition to the Presiding Officials sustained charges, dated November 11, 1980, was available to my Hearing Attorney
Contents: Four pages of arguments and thirty-two copies of supporting (mostly new) documents.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1553

Mario Chiafari,

Petitioner,

v.

Department of the Interior and
Merit Systems Protection Board,

Respondents.

On Petition for Review from
the Merit Systems Protection Board.

Argued: January 8, 1982

Decided: February 4, 1982

Before RUSSELL, HALL and MURNAGHAN,
Circuit Judges.

Peter Max Zimmerman for Petitioner; Ross W. Dembling, Office of the Solicitor, United States Department of the Interior for Respondent.

PER CURIAM:

Mario P. Chiafari was fired from his position with the National Park Service for inefficiency and insubordination. After the dismissal was upheld by the Merit Systems Protection Board, Chiafari appealed to this Court pursuant to 5 U.S.C. S7703.

On appeal Chiafari argues that the evidence insufficiently linked his misconduct to the efficiency of the Service, and the sanction of dismissal was both disproportionate to his transgressions and inappropriate in light of the evidence. Our review of the record convinces us that Chiafari's well-documented intransigence had a significant impact upon the Service's efficiency, and that these factors amply justify his dismissal.

Accordingly, the decision of the Merit Systems Protection Board is affirmed.

AFFIRMED.